

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NOEL GORDON,	:	CIVIL ACTION
	:	NO. 97-5172
Plaintiff,	:	
	:	
v.	:	
	:	
FRANK L. CAMPBELL et al.,	:	
	:	
Defendants.	:	

ORDER-MEMORANDUM

**AND NOW**, this day of **April, 1998**, upon consideration of defendants' motion for sanctions (docket entry no. 17), it is hereby **ORDERED** that defendants' motion is **GRANTED IN PART AND DENIED IN PART** as follows:

1. Plaintiff shall pay defendants \$100.00, but payment is stayed until the conclusion of the litigation; and
2. Defendants are granted leave to take the deposition of plaintiff at the prison within 30 days of the date of this order.<sup>1</sup>

The reasoning of the Court is as follows:

Plaintiff is an inmate at the State Correctional Institution at Albion, Pennsylvania ("SCI Albion"). Plaintiff is proceeding pro se and in forma pauperis, alleging violations of his constitutional rights. After service of the complaint and the filing of an answer by defendants, the Court held an initial telephone conference with plaintiff and counsel for defendants. During the conference the Court explained to the parties:

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<sup>1</sup> See Fed.R.Civ.P. 30(a)(2), requiring an order of the court for the deposition of an inmate.

The reason we're holding this telephone conversation is to set up a schedule of events to rule on this matter. Typically what we do is have the defendant take the deposition of the plaintiff, in this case who would be Mr. Gordon. And at that time then we take a look at the case to see, number one, whether Mr. Gordon's request for the appointment of counsel is justified, and, number two, whether the case has sufficient merit to proceed, legal merit to proceed. So what we need to is schedule the deposition of Mr. Gordon which means to ask Mr. Gordon questions under oath.

Tr. at 2. The Court then orally ordered that plaintiff's deposition be taken at the institution in which plaintiff was incarcerated.<sup>2</sup> Tr. at 3.<sup>3</sup> Neither plaintiff nor counsel for defendants objected to the Court's order.

Pursuant to the Court's order, counsel for defendants scheduled plaintiff's deposition at SCI Albion for March 17, 1998. Plaintiff appeared at the deposition, but refused to answer any of counsel's questions. Instead, plaintiff insisted that a written statement which he had prepared be placed on the record in lieu of questions and answers. Gordon Dep. at 4-8. In turn, defendants' counsel warned plaintiff that defendants would move to dismiss the case unless plaintiff agreed to answer counsel's questions at the deposition. Id. Plaintiff refused. Id.

Rule 37(b)(2) of the Federal Rules of Civil Procedure authorizes the Court to impose sanctions on a party who violates

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<sup>2</sup> See Fed.R.Civ.P. 30(a)(2).

<sup>3</sup> Plaintiff was an inmate of the State Correctional Institution at Camp Hill, Pennsylvania at the time of the conference.

an order of the Court to "provide or permit discovery."<sup>4</sup> Rule 37(b)(2). Sanctions for violation of Rule 37(b), depending on the severity of the violation, range from monetary payment to

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- <sup>4</sup> Rule 37 (b) provides in pertinent part:  
(2) Sanctions by Court in Which Action is Pending. If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:  
(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;  
(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;  
(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;  
(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination .

. . .  
In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Fed.R.Civ.P. 37(b)(2).

dismissal of the action.<sup>5</sup>

In this case, it is undisputed that plaintiff refused to answer relevant, and not privileged, questions at a deposition held pursuant to an order of the Court. The issue is what penalty is appropriate to compensate defendants, to deter further breaches by plaintiff, and to vindicate the processes of the Court.

Defendants urge the Court to dismiss plaintiff's case with prejudice. Dismissal with prejudice is a drastic sanction which is "to be reserved for cases [where the breaching party exhibits] 'flagrant bad faith' and 'callous disregard' . . . ." Harris v. City of Philadelphia, 47 F.3d 1411 (3d Cir. 1995) (citing Poulis v. State Farm Fire and Casualty Co., 747 F.2d 863, 866-868 (1984)("[d]ismissal is a drastic sanction and should be reserved for those cases where there is a clear record of delay or contumacious conduct by the plaintiff.")). The Third Circuit has identified certain factors that the district court must weigh before imposing the "extreme" sanction of dismissal:

(1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

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<sup>5</sup> Rule 37(d) authorizes the imposition of sanctions provided by Rule 37(b)(2)(A)-(C). See infra note 2.

Id. at 868, 870. These factors are not to be applied mechanically, nor must all the factors be satisfied to dismiss a case. Mindek v. Rigatti, 964 F.2d 1369, 1373 (3d Cir. 1992). "The mere finding that one factor does or does not weigh against dismissal is not dispositive; instead, it is the cumulative weighing of all factors in the context of the complete litigation history which leads the Court to its determination as to whether the action should be dismissed." Milligan v. Davidson, No. 95-7693, 1996 WL 680134, at \*6 (E.D. Pa. Nov. 19, 1996). In the final analysis, the decision whether to dismiss a case falls squarely within the district judge's discretion, based upon the context of the court's experience with the litigants and the history of the litigation. Id.

Balancing the Poulis factors, the Court does not find that dismissal with prejudice is yet appropriate in this case. First, because plaintiff is proceeding pro se, it is conceivable that plaintiff misunderstood his duty to answer questions at a deposition, and believed in good faith that the duty could be satisfied by submitting a written statement.<sup>6</sup> Second, the prejudice to defendants was minimal -- defendants' counsel was only required to travel from his office to another location in

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<sup>6</sup> The Court notes, however, that at the scheduling conference, the Court did explain to plaintiff that "[to depose] means to ask Mr. Gordon questions under oath." Tr. at 2. Plaintiff did not object to his lack of representation at the deposition at that time or at any time preceding the deposition to the procedure outlined by the Court.

the same county.<sup>7</sup> Third, plaintiff has no history of delay or contumaciousness in this litigation. Fourth, plaintiff's claim appears meritorious. "A claim . . . will be deemed meritorious [for this inquiry] when the allegations of the pleadings, if established at trial, would support recovery by plaintiff . . . ." Poulis, 747 F.2d at 869-870 (also noting that the summary judgment standard is not applied in this context); Harris, 47 F.3d at 1332. Plaintiff alleges that defendants threatened him by placing a gun to his head, beat and kicked him, and sprayed pepper spray in his face without reason. These allegations, if proved at trial, and in the absence of legal justification, would support a claim of excessive force in violation of the Fourth Amendment.<sup>8</sup>

The interest of justice, however, requires some sanction upon plaintiff, lest the Court's forbearance be misunderstood by plaintiff, and perhaps by others, as providing one free pass to pro se litigants to violate the discovery rules. The Court recognizes that in the case of a plaintiff proceeding in forma pauperis, monetary sanctions may prove futile. However,

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<sup>7</sup> The Court notes that counsel for defendants who appeared at the deposition, Thomas P. Birris, Esq., listed his address as Erie, Pennsylvania. Gordon Dep. at 2.

<sup>8</sup> "When an 'excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons . . . against unreasonable . . . seizures' of the person.'" Sharrar v. Felsing, 128 F.3d 810, 820 (3d Cir. 1997) (quoting Graham v. Connor, 490 U.S. 386, 394 (1989)).

an in forma pauperis litigant is not automatically excepted from monetary sanctions, at least so long as immediate payment of the sanctions is not a pre-condition to pursue the litigation. Therefore, the Court finds that the imposition of sanctions in the amount of \$100.00, but staying payment of the sanction until the conclusion of the litigation, is just under the circumstances. The limited sanction is intended to serve as a prophylactic against future violations by plaintiff and partial compensation to defendants, and to vindicate the Court's processes. The Court also warns plaintiff that further discovery violations may result in dismissal of the complaint with prejudice.

**AND IT IS SO ORDERED.**

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EDUARDO C. ROBRENO, J.